



No. 78-1913

**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

ROBERT G. MYTNIK,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS**

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ROBERT G. MYTNIK,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
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*To the Chief Justice and Associate Justices of the Supreme
Court of the United States:*

The Petitioner, Robert G. Mytnik, respectfully prays
that a writ of certiorari be issued to review the decision
in this case made by the Appellate Court of Illinois.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First
Judicial District, is reported as *People of the State of
Illinois v. Robert G. Mytnik*, 66 Ill. App. 3d 624, 384 N.E.
2d 435, 23 Ill. Dec. 641 (1978), and is set forth herein as
Appendix A.

JURISDICTION

The Appellate Court of Illinois, First Judicial District, entered its judgment on November 15, 1978 affirming Petitioner's August 30, 1977 conviction. [App. A] Petitioner's timely petition to that Court for a rehearing was denied on December 13, 1978. [App. B] Thereafter, Petitioner's timely petition for leave to appeal to the Illinois Supreme Court was denied on March 29, 1979. [App. C]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the trial judge, in sentencing Petitioner on a conviction of misdemeanor battery, violated Petitioner's constitutional right to due process by relying on assumptions regarding Petitioner's behavior which were materially false and which were based upon improper out-of-court information.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall . . . deprive any person of life, liberty or property, without due process of law; . . .

Article 1, Section II of the Illinois Constitution provides in pertinent part:

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

The Illinois Criminal Code, *Ill. Rev. Stat. Chap. 38, Section 12-3* (1973), provides:

(a) A person commits a battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual

(b) Sentence

Battery is a Class A misdemeanor.

The Illinois Criminal Code, *Ill. Rev. Stat. Chap. 38, Section 116-1* (1964), provides in pertinent part:

(b) A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict . . .

The Illinois Criminal Code, *Ill. Rev. Stat. Chap. 38, Section 1005-8-3* (1975), provides in pertinent part:

(a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:

(1) for a Class A misdemeanor, for any term less than one year . . .

STATEMENT OF THE CASE

Petitioner was charged in a misdemeanor complaint with simple battery, the complaint charging that he "... intentionally, without legal justification, made contact with Laura Spalla by grapping [sic] her by the arms and pulling her toward him."

Petitioner was found guilty after a bench trial on August 30, 1977 before the Honorable Calvin C. Campbell,¹ who sentenced the Petitioner to one year in the House of Corrections. Three days later, during the court's hearing on Petitioner's post-trial motions, this sentence was reduced to six months incarceration.

Petitioner appealed the trial court's decision and sentence to the Appellate Court of Illinois First Judicial District, raising the issue, among others, of whether he was denied a fair trial by the inflammatory and improper comments of the prosecutor which caused the trial court to make use of newspaper articles not of record and sentence Petitioner for a sex offense he was neither charged with nor convicted of. On November 15, 1978, the Appellate Court filed an Opinion affirming the conviction and the sentence. [App. A]. One judge dissented as to sentencing, finding that the trial court's comments at the time of sentencing indicated that the court was motivated by a sex crime which did not occur, rather than the simple battery for which Petitioner was convicted. [App. A].

¹ At the time of the trial, Judge Campbell had been on the bench for two and one half months, having been appointed on June 15, 1977, 8 *Jud. Admin. Newsletter*, no. 2, p. 1 (Aug. 1977).

On December 6, 1978, Petitioner filed a Petition for Re-hearing, arguing that, contrary to the finding by the Appellate Court in its majority opinion, Petitioner had met his burden of rebutting the presumption that the trial court was not influenced by incompetent evidence and thus had established he was sentenced on the basis of improper factors and erroneous information. The Appellate Court denied this Petition on December 13, 1978. [App. B] On January 16, 1979, Petitioner filed a Petition for Leave to Appeal in the Supreme Court of Illinois, arguing that the trial court violated his constitutional and statutory rights. The Supreme Court of Illinois denied the Petition on March 29, 1979. [App. C]. The Illinois Supreme Court issued its mandate in this cause on April 23, 1979. [App. D]. The Appellate Court of Illinois granted Petitioner's Motion to Stay Mandate on May 2, 1979, [App. E], pending this Court's decision on Petitioner's petition for writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

The Trial Judge, in Sentencing Petitioner on A Conviction of Misdemeanor Battery, Violated Petitioner's Constitutional Right to Due Process by Relying on Assumptions Regarding Petitioner's Behavior Which Were Materially Untrue and Which Were Based upon Improper Out-of-Court Information.

Over thirty years ago, this Court recognized the principle that a defendant is entitled to due process at his sentencing. *Townsend v. Burke*, 334 U.S. 736 (1948). Moreover, this Court has stated that while a sentencing judge has broad discretionary authority to avail himself of out-of-court information in determining a sentence, this discretionary power is susceptible to abuse. *Williams v. New York*, 337 U.S. 241 (1949). Such a due process abuse occurs when a sentencing judge bases his decision on out-of-court information which is extensively and materially false, as in the *Townsend* case where the sentencing judge inaccurately assumed or was led to believe the defendant's prior criminal charges were in fact convictions. *Townsend v. Burke*, *supra* at 740-741. Another example of such abuse occurred in *United States v. Tucker*, 404 U.S. 443 (1972), wherein this Court held that the sentencing judge's consideration of the defendant's previous felony convictions constituted a due process violation, since those convictions were later ruled to have been constitutionally infirm. In *Tucker*, this Court affirmed an order of the Ninth Circuit Court of Appeals remanding the case for resentencing since the sentence was based on assumptions which were materially untrue and, absent consideration of those false assumptions, the factual circumstances of the defendant's background would appear in a dramatically different light. *United States v. Tucker*, *supra* at 447-448. The instant case falls within the prin-

ciples enunciated in *Tucker* and *Townsend* since the sentencing judge relied upon out-of-court information in making materially false assumptions about the Petitioner's behavior. Consequently, Petitioner was sentenced in a manner which violated his due process rights. In order to avoid a grave miscarriage of justice caused by a decision unduly harsh in its impact, Petitioner requests that this court grant his petition and order that his case be remanded for resentencing.

A misdemeanor complaint charged Petitioner with committing a battery on Laura Spalla on July 6, 1977, in violation of *Ill. Rev. Stat* ch. 38, § 12-3 (a) (1973). The case was tried to the court without a jury on August 30, 1977. The complaining witness and her friend, twelve and thirteen years old, respectively, testified that at about one o'clock in the afternoon of July 6, 1977, as they were walking down a Chicago street, a man they identified as Petitioner stopped his car and asked them if they wanted a ride. [R. 4, 11-12].² They further testified that after they refused the offer, Petitioner got out of his car, approached the complaining witness from behind and placed one hand on each of her shoulders. [R. 4-7, 12]. The girls then punched and pinched Petitioner and jumped on his back until he said, "Okay, girls," walked back to his car and drove away. [R. 7, 12-13]. They took down his license plate number which they reported to a policeman. [R. 7, 13].

The only other State witness was a Chicago Police Officer who testified that on July 7, 1977, he traced the license plate number, called Petitioner's office and met with Petitioner on July 7, during which time Petitioner told

² [R.] refers to proceedings had on August 30, 1977. [P.] refers to post-trial proceedings had on September 2, 1977.

the Officer he saw the girls but never left his automobile. [R. 17-20].

Petitioner testified on his own behalf, stating that he saw the girls twice on July 6, 1977, once at a restaurant where the girls winked and smiled at him, and later when he offered them a ride. [R. 26, 29]. When they declined, he drove away without getting out of his car. [R. 31]. Petitioner further testified that he was thirty-nine years old, married with two children and steadily employed as a field manager and sales representative for an insurance firm. [R. 24, 25].

During her closing argument, the Assistant State's Attorney ruminated:

I wonder what would of [sic] happened if Laura had been out there all by herself that day walking down the street and this thirty-nine-year old man pulled her in that car. [R. 39].

This first of many *ad terrorem* appeals by the prosecutor, wherein she mischaracterized the facts of the case in an inflammatory fashion, had a profound and prejudicial effect upon the trial judge. The above statement resulted in the trial judge's denying Petitioner the statutory thirty day period for filing post-trial motions as established by *Ill. Rev. Stat. ch. 38, § 116-1 (1964)*. Instead, during a hearing at the close of the trial, the trial judge reluctantly allowed Petitioner only *three days* to prepare and file his post-trial motions. The judge stated:

[W]e have a forthcoming holiday coming up and I am not going to make it possible for this defendant, by any order that I enter, unless your motion prevails. He was riding out in that area two days after the Fourth of July. We have another holiday coming up this weekend, and I am not anticipating [sic]

your motion. I am not going to grant any extension of time to this defendant. [R. 43].

The court's unwarranted statement indicates its unjustified belief that since Petitioner was charged with a battery on July 6, 1977, two days after the Fourth of July, he would likely commit another violation two days after Labor Day, September 5, 1977.

At this same hearing at the close of the trial, the judge asked for matters in aggravation and mitigation of sentencing. [R. 39]. The prosecutor, acknowledging that this was Petitioner's first arrest, recommended a sentence of one year incarceration and asked the court to deny petitioner an appeal bond. [R. 39]. Counsel to Petitioner informed the court that not only had Petitioner never been arrested before, but also that he has an honorable military record, he has been employed all his life, and is the sole support of his wife and children. [R. 40]. In total disregard of these factors, the trial court sentenced Petitioner to what it understood to be the maximum sentence, one year incarceration. [R. 42]. In fact, this sentence was in excess of the statutory limit set by *Ill. Rev. Stat. ch. 38, § 1005-8-3(a) (1) (1975)*, which provides that a sentence of imprisonment for a Class A misdemeanor shall be for any term *less* than one year.

Three days later, on September 2, 1977, the trial court held a hearing on Petitioner's post-trial motions, at which time the prosecutor again inflamed the passions of the trial judge by transforming Petitioner's conviction for simple battery into a conviction for a sex offense, when she asserted:

[A girl of] twelve years old should be able to walk down any street in the City of Chicago, State of Illinois, and County of Cook.

She should not be grabbed by anyone. It was my feeling now as it was then, that if her friend was not with her Erin O'Doheity [sic] *I am not sure that we would have had a battery charge. I am not sure we would of [sic] had either one of the girls with us today.* [P. 14]. [Emphasis added].

The fact that the trial judge was improperly influenced by the prosecutor's repeated and uncalled for inflammatory references to the sexual molesting of the complaining witness and her friend is clearly illustrated by the trial judge's comments, made just after he reduced Petitioner's sentence to six months incarceration:

Do we agree with the State's Attorney to make argument about what happened and what did not happen. [sic]. Of course, the Court cannot consider the fact that her friend was alone. I think the Court commented on this the other day. *The fact that if her younger friend was alone this would of [sic] ended up in a very serious matter. One only has to read the newspapers this week to take into consideration what could of [sic] happened to young people and children.* [P. 25-26].

The judge's comment obviously related to certain newspaper articles in the Chicago morning newspapers on August 30, 1977, the day of the trial. Banner front page headlines in the *Chicago Sun-Times* ("MISSING N. SIDE GIRL FOUND DEAD") and the *Chicago Tribune* ("FIND MISSING N. SIDE GIRL'S BODY IN SKOKIE") were followed by stories concerning the discovery of the body of a sixteen-year-old girl in Skokie, Illinois, as well as the murder of a twelve-year-old girl in Lake County, Illinois, whose body was found August 26, 1977.

The significance of the trial judge's expressed and explicit concern over what might have, but did not in fact, happen is not mitigated by his statement "This is not part of the case," [R. 26], as pointed out by Judge Simon of the Illinois Appellate Court in his dissenting opinion. [App. A]. The trial judge, himself, by referring to newspaper articles not matters of record, improperly made the articles part of his sentencing deliberations. Moreover, in reducing Petitioner's sentence from one year to six months, the trial judge, again expressly, stated that he did so not out of sympathy for Petitioner, or for Petitioner's benefit, but only for the benefit of his family. [P. 24-25]. In so stating, the trial judge revealed the full extent to which he had abused his discretion and relied upon his materially inaccurate assumptions regarding what might have happened. Despite the explicit mandate of Article 1, § 11 of the Illinois Constitution, which states that "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship," the trial judge refused to sentence Petitioner on a conviction for a simple misdemeanor battery in which no one was hurt.³ Moreover, he refused to consider the excellent rehabilitative potential of a first offender who, the trial judge was aware, had a previously spotless criminal record, received an honorable discharge from the Army in 1959 with a rank of corporal, served sixteen months in Korea as a

³ To no avail, defense counsel informed the trial judge of decisions in similar Illinois simple battery cases where the courts held that since no blows were struck and no physical injury occurred, imposition of jail sentences were excessive and unwarranted. *People v. Gimmler*, 45 Ill.App. 3d 440, 361 N.E.2d 44 (1977); *People v. Vaseska*, 74 Ill. App. 2d 297, 220 N.E.2d 248 (1966).

combat construction specialist engineer, had been gainfully employed in the insurance industry since his discharge from the Army (a period of nineteen years), and is the sole support of his wife and two children. The trial judge was aware of all these factors but, because he was so inspired and inflamed by the prosecutor to sentence Petitioner for a sex offense not even charged, he did not listen. Indeed, the trial judge focused so completely on the uncharged, unproven sex offense that he travelled well beyond the prejudicial in-court arguments of the prosecutor to rely on even more prejudicial out-of-court information which he, himself, found in recent newspaper articles.

The trial judge's reliance on this out-of-court information is an even more egregious violation of Petitioner's due process rights than the abuses condemned by this Court in *Townsend v. Burke*, 334 U.S. 736 (1948), and *United States v. Tucker*, 404 U.S. 443 (1972). In *Townsend*, the trial judge, at the time of sentencing, was either misinformed by the prosecutor or misread the record concerning the defendant's prior offenses. In *Tucker*, the trial judge was unaware of the constitutional infirmity of the defendant's prior convictions on which the trial judge in part based his sentence. In neither case did these sentencing judges base their materially incorrect assumptions on extrinsic matters not of record which they, themselves, brought into the courtroom. But that is precisely the case here, where the sentencing judge refused to grant Petitioner his statutory thirty-day period for filing post-trial motions, based on his premonition Petitioner would commit a similar offense during another holiday weekend; where the sentencing judge initially sentenced Petitioner to a period in excess of the statutory

limit; where the sentencing judge made what amounts to a token reduction of that sentence in express disregard of the standards enunciated in the Illinois Constitution; where the sentencing judge expressly and repeatedly concerned himself with what might have happened to the complaining witness had she been alone; where the sentencing judge reinforced his totally unwarranted concern by means of recent newspaper articles illustrating to him "what could of [sic] happened." [R. 39, 43; P. 26].

The sentencing judge's prejudicial and inaccurate pre-occupations resulted in his sentencing Petitioner for a sex offense neither charged nor proven, not for the simple battery of which Petitioner was convicted. The sentencing judge's disregard of the factual circumstances of Petitioner's background and his repeated utilization of his assumptions concerning Petitioner's behavior which were materially untrue, thus deprived Petitioner of his constitutional right to due process.

CONCLUSION

Without consideration of "what might have happened" and without reliance upon prejudicial newspaper articles *de hors* the record, the factual circumstances of Petitioner's background would have appeared in a dramatically different light at the sentencing proceeding. Since the sentencing judge imposed sentence on misinformation of a constitutional magnitude, he deprived Petitioner of his due process and statutory sentencing rights.

For these reasons, and in order to avoid a grave miscarriage of justice caused by a decision unduly harsh in its impact, Petitioner prays that this Honorable Court issue a writ of certiorari to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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APPENDIX

APPENDIX A: Decision And Opinions Of Appellate Court Of Illinois

77-1642

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ROBERT G. MYTNIK,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Honorable CALVIN C. CAMPBELL, *Judge Presiding.*

MISS JUSTICE MCGILLICUDDY DELIVERED THE OPINION OF THE COURT:

Following a bench trial the defendant, Robert G. Mytnik, was convicted of the offense of battery (Ill.Rev. Stat., 1977, ch. 38, par. 12-3(a)), and sentenced to six months in the House of Correction. The defendant contends on appeal that (1) he was not proved guilty beyond a reasonable doubt, (2) he was unfairly prejudiced by inflammatory and improper remarks of the prosecutor, (3) the trial court prejudicially restricted his right to cross-examine a witness, and (4) his sentence was excessive.

The complainant, a 12-year-old girl, testified that on July 6, 1977, at 1:00 p.m., she was walking south on Artesian between 111th and 112th Streets in Chicago. She stated that the defendant, who was driving in a northerly direction, stopped his car to ask her what she was doing and if she needed a ride. The complainant declined and started to walk away. The defendant got out of his car, grabbed her shoulders from behind and pulled her toward him. The complainant screamed and her 13-year-old girl friend ran to them and jumped on

his back. The 13-year-old girl bit the defendant while the complainant pinched his arms. The complainant stated that the defendant said, "Okay, girls," got back into his car and drove off.

The complainant's testimony was corroborated by her friend, who added that just prior to the incident she and the complainant were in a restaurant. The defendant was at a nearby table and attracted their attention by making noises and winking at them. When they left the restaurant and walked south on Artesian, the witness stopped to pet a dog and heard the complainant cry out. She went to the girl's assistance and jumped on the defendant's back. After a further struggle, the defendant drove off and the witness stopped a police car and told them of the incident. The complainant also gave the police the license number of the defendant's car.

Police Officer William Towns testified that on July 7, 1977, he checked the license number and learned that it was registered to a company. When he called the company he was told that the driver would contact him. The defendant called and later reported to the police station. The officer stated that the defendant admitted that he had seen the girls and offered them a ride, but he denied that he got out of his car or touched the girls.

The defendant testified in his own behalf. He stated that he was 39 years old, resided with his wife and two children and was employed as a field manager for an insurance company. He admitted that he saw the girls in the restaurant and stated that they were giggling between themselves and smiling at him. He denied that he did anything to attract their attention. After the girls left, he finished eating, got into his car and drove around the block. While driving north on Artesian he saw the girls walking south and called from the automobile window to ask them if they wanted a ride. They responded "No," and he proceeded on without getting out of his car or touching the girls.

The defendant contends that he was not proved guilty beyond a reasonable doubt because the girls did not see him leave his car and because the complainant described the car as brown when, in fact, the car was yellow. Further, he maintains that their testimony was not corroborated by any other witnesses to the attack, which allegedly occurred at 1:00 p.m. on a residential street. In addition, Officer Town did not notice any evidence of bite marks or bruises on the defendant when he saw him the next day.

It is well settled that it is the function of the trier of fact to determine the credibility of the witnesses, the weight to be given to their testimony and the inference to be drawn from the evidence. (*People v. Akis* (1976), 63 Ill.2d 296, 347 N.E.2d 733.) Here, there is no dispute that the girls saw the defendant in the restaurant and saw him a few minutes later in his car when he offered them a ride. The girls were positive in their identification of the defendant as the assailant, and the record is silent as to whether the officer observed any marks or bruises on the defendant. The trial court was not compelled to accept the defendant's version of the incident. When the evidence is merely conflicting as here, a court of review will not substitute its judgment for that of the trier of fact. *People v. Akis, supra*.

The defendant next contends that he did not receive a fair trial because the prosecutor made inflammatory comments which caused the court to improperly consider matters and probabilities not based on the evidence adduced at trial. The record shows that at the end of her closing argument, the prosecutor commented without objection that she wondered what would have happened if the complainant had been alone. Thereafter, the court expressed uncertainty for the reason a 39-year old man would stop and offer a ride to two young girls whom he did not know. It is well settled that where the trial court is the trier of the fact, every presumption will be accorded that the court considered only admissible evidence and discarded inadmissible evidence in reaching

its conclusion. (*People v. Robinson* (1964), 30 Ill.2d 437, 197 N.E.2d 45.) The presumption that the court cannot be prejudiced by incompetent evidence can only be rebutted by an affirmative showing by the defendant (*People v. Woods* (1976), 41 Ill.App.3d 29, 353 N.E.2d 304), and there will be no reversal unless it affirmatively appears that the court was improperly influenced by such testimony. (*People v. Meier* (1975), 30 Ill.App.3d 1, 332 N.E.2d 1.) Here, in commenting upon the defendant's act of offering the girls a ride, the court was clearly considering the defendant's admission at trial that he had done so. There is no indication that the court was influenced by the prosecutor's remark as to what might have happened if the complainant had been alone. Moreover, at the post-trial hearing, it is clearly evident that the court rejected the prosecutor's comments when it stated: "Of course, the Court cannot consider the fact that her friend was alone. . . . This is not a part of the case."

The defendant further contends that when the defense counsel was cross-examining the 13-year-old witness, the court improperly restricted his right to explore the extent of any bias, motive and opportunity for the witness to conform her testimony to that of the complainant. The defense counsel asked the witness if she had talked to the complainant about the incident, to which she replied, "Sometimes." He then asked, "And tell us about how many times you have talked about it?" At this point the prosecutor said: "Objection. She talked to the police, her mother and me too." The court sustained the objection and defense counsel asked no further questions of the witness. The State argues that the questioning was ambiguous in nature. The defense counsel abandoned questioning the witness and made no further attempt to pursue a theory of bias or improper motivation on the part of the witness. The record does not reveal that there was a clear and prejudicial abuse of discretion on the part of the trial court. *People v. Gallo* (1973), 54 Ill.2d 343, 297 N.E.2d 569.

Finally, the defendant contends that the sentence was excessive for a man with no prior criminal record. The trial court initially sentenced the defendant to one year; however, at a post-trial hearing the sentence was reduced to a term of six months. The Supreme Court held in *People v. Perruquet* (1977), 68 Ill.2d 149, 368 N.E.2d 882, that:

"Our Rule 615(b)(4) grants reviewing courts the power to reduce the sentence imposed by the trial court. [Citation.] The rule itself does not address the scope of this power or the circumstances under which it should be exercised. However, our decisions have firmly established that the imposition of a sentence is a matter of judicial discretion and that, absent an abuse of this discretion, the sentence of the trial court may not be altered upon review. [Citations.]"

The sentence imposed is within the statutory range. The court was aware of the defendant's prior history. However, it was also aware of the nature of his particular battery. The trial judge listened to all the evidence, inspected all of the witnesses, and was in the best position to assess the seriousness of the offense and the most appropriate punishment. We find that the sentence imposed by the trial court was not an abuse of discretion.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

JIGANTI, P.J., concurs.

SIMON, J., concurring in part and dissenting in part:

The trial judge's comments at the time of sentencing indicate that he considered matters in deciding the sentence which were not relevant to that determination. This probably explains the length of the sentence for a battery involving slight physical harm which the defendant—a 39-year-old, employed and married homeowner and father who had no previous record and served honorably

in the armed forces of the United States in Korea during the time of combat there—was given.

The offense with which the defendant was charged and of which he was found guilty was battery. However, comments of the court at the time of the sentencing hearing indicate that the trial judge might have been motivated, at least in part, by his expressed concern that the victim might also have been sexually molested had her companion not intervened. That the trial judge was thinking not only of what happened but of what might have happened is also suggested by his reluctance to postpone the filing of post-trial motions until a date after Labor Day, 1977. The conduct which resulted in the defendant's being found guilty occurred 2 days after the Fourth of July 1977, and the judge's comments suggest that he feared the defendant might repeat his conduct after another holiday weekend. The significance of the trial judge's expressed concern over what might have happened is not lessened by his comment that, "This is not part of the case."

Perhaps the trial judge's concern was not misplaced, but whatever sentence was imposed for the battery should have been based solely on what happened rather than on what might have happened and the harm the victim of the battery could have suffered. The defendant should have been sentenced for a battery which did not involve severe physical contact rather than for a sexual crime which did not occur.

Thus, my study of the record convinces me that too much emphasis was placed on viewing the defendant as a sex offender and too little emphasis on attempting to determine whether his experience taught the defendant a lesson not to repeat his conduct and whether this defendant could best be restored to useful citizenship (Ill. Const. 1970, art. I, sec. 11) by serving a shorter jail sentence or being placed on probation. Accordingly, my opinion is that this matter should be remanded to the circuit court for a new sentencing hearing.

[Opinion Filed: November 15, 1978]

**APPENDIX B: Order Of Appellate Court Of Illinois
Denying Petition For Rehearing**

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 77-1642

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

ROBERT G. MYTNIK,
Defendant-Appellant.

ORDER

IT IS HEREBY ORDERED that appellant's Petition for Rehearing be and the same is hereby denied.

Dated at Chicago, Illinois, this 13th day of December, 1978.

ENTER:

/s/ M. R. Jiganti
Justice

/s/ Helen F. McGillicuddy
Justice

**APPENDIX C: Notice Of Order Of Illinois Supreme
Court Denying Petition For Leave To
Appeal**

No. 51576 - People State of Illinois, respondent, vs.
Robert G. Mytnik, petitioner. Leave to appeal,
Appellate Court, First District.

The Supreme Court today denied the petition for leave
to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

[Dated: March 29, 1979]

**APPENDIX D: Notice Of Order Of Illinois Supreme
Court Issuing Mandate**

April 23, 1979

To Attorneys Of Record And Parties:

You are hereby notified that the mandates in the cases
listed below were today issued to the appropriate Ap-
pellate Court Clerks:

Clell L. Woods
Clerk of the Supreme Court

• • •

No. 51576 - People State of Illinois, respondent, vs.
Robert G. Mytnik, petitioner. Leave to appeal,
Appellate Court, First District.

**APPENDIX E: Order Of Appellate Court Of Illinois
Granting Petitioner's Motion To Stay
Mandate**

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 77-1642

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.

ROBERT G. MYTNIK,
Defendant-Appellant.

Appeal from Circuit Court of Cook County,
Municipal Department, First District.

ORDER

Defendant-Appellant ROBERT G. MYTNIK'S *Motion
to Stay Mandate* is granted.

/s/ Seymour Simon
Justice

/s/ Helen F. McGillicuddy
Justice

/s/ M. R. Jiganti
Justice

Dated: May 2, 1979